Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Dockets Nos. 95-20, 98-10

COMMENTS OF THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

The Public Service Commission of Wisconsin ("Commission") supports the Federal Communications Commission's (FCC) adoption of federal policies that promote the deployment of broadband facilities and services, especially to areas that the market may overlook,[1] while also promoting competition and protecting the service quality of plain old telephone service ("POTS").

The Wisconsin Commission is concerned, however, that there already exists significant broadband capacity that far exceeds demand. In a speech late last year, Chairman Michael K. Powell estimated broadband availability to be almost 85%.[2]

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[1] The FCC acknowledged this "digital divide" in its second annual report to Congress naming five groups as vulnerable to being bypassed: rural, inner-city, low-income, minority, and tribal. *Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, CC Docket No. 98-146, Report, 15 F.C.C.R. 20913 (2000) (Second Report).

[2] Remarks of Michael K. Powell, Chairman, Federal Communications Commission, National Summit on Broadband Deployment, Washington, D.C. (October 25, 2001).

And, in its *Third Report on the Availability of High-Speed and Advanced Telecommunications Services*, the FCC concludes that overall, the deployment of advanced telecommunications capability to all Americans is reasonable and timely.[3] With respect to investment, the FCC states that analysts observe that carriers have continued to invest in this sector in a substantial way resulting in increased availability of various high-speed and advanced services platforms for consumers throughout the nation. Analysts predict this trend will continue.

Given the FCC's conclusions in its *Third Report*, the Wisconsin Commission sees little need, if any, to "dismantle existing regulatory provisions designed to prevent anti-competitive abuse in order to create 'incentives' for Incumbent Local Exchange Carrier (ILEC) broadband deployment."[4] The FCC should focus on policies that promote competition and increase demand for broadband services.

I. INTRODUCTION

On February 14, 2002, the FCC opened the instant proceeding to "resolve outstanding issues regarding the classification of telephone-based broadband Internet access services and the regulatory implications of that classification." This action follows four other related proceedings - the *National Performance Measures NPRM*,[5] the

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[3] *Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion,* CC Docket No. 98-146, Report, FCC 02-33 (2002) (Third Report).

[4] Comments of the Information Technology Association of America, *Review of Regulatory Requirements for Incumbent Broadband Telecommunications Services, Notice of Proposed Rulemaking*, CC Docket No. 01-337, FCC 01-360 (rel. Dec. 20, 2001).

[5] *In the Matter of Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, CC Docket No. 01-318, *Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, CC Docket No. 98-56, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Petition of Association for Local Telecommunications Services for Declaratory Ruling*,

Incumbent Local Exchange Carrier (LEC) Broadband Notice[6] and the *Triennial UNE Review Notice*[7] and the *Cable Modem Notice of Inquiry (NOI)*,[8] that in the FCC's opinion, build the foundation for a comprehensive and consistent national broadband policy.

At the heart of this proceeding is the FCC's tentative conclusion that the transmission component of retail wireline broadband Internet access service provided over an entity's own facilities is "telecommunications" and not a "telecommunications service." The instant investigation has far-reaching implications because if wireline broadband Internet access is classified as an "information service" it would mean that digital subscriber line service (DSL) would fall under Title I of the Communications Act of 1934, as amended,[9] instead of Title II. Title II common carriage regulations impose a host of requirements on companies, including price regulations, interconnection mandates, and unbundling/line sharing rules. By comparison, services that are designated "information services" and covered under Title I face far fewer regulations.

CC Docket Nos. 98-147, 96-98, 98-141, Notice of Proposed Rulemaking, FCC 01-331, 16 F.C.C.R. 21428 (rel. December 7, 2001) (National Performance Measures NPRM).

[6] *Review of Regulatory Requirements for Incumbent LEC Broadband Services; SBC Petition for Expedited Ruling That it is Non-Dominant in its Provision of Advanced Services and for Forbearance From Dominant Carrier Regulation of These Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, FCC 01-360, 16 F.C.C.R. 22745 (rel. Dec. 20, 2001) (Incumbent LEC Broadband Notice).

[7] *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01- 338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98- 147, Notice of Proposed Rulemaking, FCC 01-361, 16 F.C.C.R. 22781 (rel. Dec. 20, 2001) (Triennial UNE Review Notice).

[8] *Internet Over Cable Declaratory Ruling,* GN Docket No. 00-185*,* FCC 02-77 (rel. March 15, 2002).

[9] 47 U.S.C. §§ 151 et seq, amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

The FCC's tentative conclusions raise a myriad of questions whose answers appear preordained.

II. WIRELINE BROADBAND INTERNET ACCESS SERVICES ARE TELECOMMUNICATIONS SERVICES

The FCC tentatively concludes that wireline broadband Internet access services – whether provided over a third party's facilities or self-provisioned facilities – are information services subject to regulation under Title I of the Act. Specifically, that when an entity provides wireline broadband Internet access service over its own transmission facilities, this service, too, is an information service under the 1996 Act. Additionally, the FCC tentatively concludes that the transmission component of retail wireline broadband Internet access service provided over an entity's own facilities is "telecommunications" and not a "telecommunications service."

In reaching its tentative conclusion, the FCC necessarily relies on the text of the Act. The starting point for interpretation of a statute "is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc*., 447 U.S. 102, 108 (1980). It is a cardinal principle of statutory construction to give effect, if possible, to every clause and word of a statute. *Williams v. Taylor*, 529 U.S. 362 (2000). Under the normal rule of statutory construction, identical words used in different parts of the same act are intended to have the same meaning. *Cox v. City of Dallas*, 256 F.3d 281, 294 (5th Cir. 2001). For the reasons that follow, the FCC fails to apply any of the canons of statutory construction to its limited analysis of the statutory definitions at issue.

At issue is the FCC's definition of the terms "telecommunications," "telecommunications service" and "information service." With little explanation, the FCC concludes that wireline broadband Internet access service is an "information service," and that the transmission aspect of that service is "telecommunications" not "telecommunications service."[10]

The 1996 Act

The 1996 Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[11] "Telecommunications service" is defined in turn as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[12] Finally, the Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[13]

[10] On March 15, 2002 the FCC issued a declaratory ruling on its *Cable Modem NOI* classifying cable modem service as an information service under Title I of the Act and not a cable service under Title VI. The ruling also stated that cable modem service is not subject to common carrier regulations, which would have required cable companies to open their lines to alternative Internet Service Providers (ISP's).
[11] 47 U.S.C. § 153(43).
[12] 47 U.S.C. § 153(46).
[13] 47 U.S.C. § 153(20).

FCC Discussion

Under the FCC's definition of telecommunications, "an entity *provides* telecommunications only when it both provides a transparent transmission path *and* it does not change the form or content of the information."[14] The FCC reasons that if this offering is made directly to the public for a fee, it is deemed a "telecommunications service."[15] Thus, according to the FCC, "[w]hen an entity offers subscribers the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information *via telecommunications*,' it does not *provide* telecommunications, it is *using* telecommunications."[16] This analysis begs the question—if an entity is using telecommunications, then who or what is providing the telecommunications service? The FCC's definitions draw a distinction without a difference and simply do not fit within the statutory framework.

Applying its definition, the FCC tentatively concludes that providers of wireline broadband Internet access service offer more than a transparent transmission path to end-users and offer enhanced capabilities.[17] Nowhere in Congress' definition of "telecommunications" and "telecommunications service" is the term "enhanced

[14] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities,* CC Docket No. 02-33*,* Notice of Proposed Rulemaking, FCC 02-42, para. 19 (Notice) (rel. Feb. 15, 2002).
[15] The FCC rejected the argument that "a service qualifies as a 'telecommunications service' whenever the service provider transports information over transmission facilities, without regard to whether the service provider is using information-processing capabilities to manipulate that information or provide new information." *Id.* at par. 40.
[16] *Notice*, para. 19.
[17] *Notice*, para. 20.

capability" found.[18] "Telecommunications" requires a transmission path and no change in the form or content of the information as sent and received. To the extent that the FCC agrees that the provision of wireline broadband Internet access has a telecommunications component, its definition of "telecommunications" does not appear to conflict with Congressional intent.

The FCC's Analytical Flaw

The Wisconsin Commission takes issue, however, with the FCC's attempt to redefine "telecommunications service" by stripping away the "service" component. The FCC correctly follows the statutory definition that if telecommunications is offered directly to the public for a fee, it is deemed a "telecommunications service." However, the FCC incorrectly asserts that providers of wireline broadband Internet access service that provision the service over their own facilities do not offer "telecommunications for a fee directly to the public."

The FCC's analysis performs another act of legal jujitsu, by distorting definitional statutes that are written with conspicuous conceptual distinctions. "Telecommunications" is the act of transmission of "information" between user-specified points, without alteration of the change in format or content of the information. "Telecommunications service" is the offering of a service that provides to a typical subscriber always-available means to execute "telecommunications" when the user chooses.

[18] The FCC interprets enhanced services and information services to extend to the same functions. *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking ("*Non-Accounting Safeguards Order*"), 11 F.C.C.R. 21905, 21955-56 ¶ 102 (1996).

"Information services" does not embrace "telecommunications," but is defined separately as a capability to manage information "via telecommunications." Moreover, "information services" is defined as effectively dependent upon "telecommunications." As the transmission of unchanged "information," "telecommunications" by definition embraces the "information" supplied *by a user to utilize the "capability" to manipulate other information.* Simply put, the subscriber's instructions to operate or manipulate the online information made available by the service provider is a form of *information that is transmitted unchanged* if the subscriber is to get the desired data or information. "Information services" inherently rely upon transmission of instructional-type "unchanged information." The FCC's definition incorrectly glosses over a distinct functional separation of the transmission of unchanged information that is "telecommunications," from the "capability" to manipulate *other* information at a "point" selected by the user, namely the provider of the "information service."

The FCC does not explain its tortured interpretation of "telecommunications service." The FCC simply ignores the remaining part of the statutory definition of "telecommunications service"--"… for a fee directly to the public, *or to such classes of users as to be effectively available directly to the public, regardless of the facilities used,*" contravening a cardinal principle of statutory construction that effect be given to every clause and word of a statute. *See Williams*, 529 U.S. at 425. The FCC offers no explanation other than that it views wireline broadband Internet access service as not consisting of two separate services, but as a single integrated offering to the end-user. Saying it does not make it so.

Clearly, whether telecommunications is part of an integrated service offering or a stand-alone broadband transmission, it is the offering of telecommunications *for a fee directly to the public*, *or to such classes of users as to be effectively available directly to the public, regardless of the facilities use.* The FCC's reasoning that when offered as an integrated service, an entity does not *provide* telecommunications; it is *using* telecommunications, runs contrary to Congressional intent. The term *provide* appears nowhere in the definition of "telecommunications service." However, when it is *using* telecommunications, an ILEC is in fact part of that *class of users* that *effectively makes telecommunications available directly to the public for a fee*.

The FCC's decision is contrary to the Ninth Circuit's finding in *AT&T Corp. v. City of Portland*, 216 F.3d 871(9th Cir. 2000) that :

> Like other ISPs, @Home consists of two elements: a "pipeline" (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all of the transmission facilities between its subscribers and the Internet. To the extent @Home is a conventional ISP, its activities are one of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.

City of Portland, 216 F.3d at 878. Similarly, to the extent that an ILEC controls all of the transmission facilities between its subscribers and the Internet, and the ILEC provides its subscribers with broadband Internet access over its transmission (telephone) facilities, the ILEC is providing telecommunications service as defined in the Act.

III. GIVEN THE SIMULTANEOUS PROCEEDINGS BEFORE THE FCC, THERE ARE TOO MANY VARIABLES TO EVALUATE A PROPER REGULATORY FRAMEWORK FOR WIRELINE BROADBAND INTERNET ACCESS SERVICES.

The FCC seeks comment on what regulations should apply in the future if it finds ILEC broadband offerings to be information services subject to Title I of the Act.[19] Specifically, the FCC is examining implications of Title I classification for wireline broadband offerings for non-discriminatory access and other core communications policy objectives.[20] In light of those objectives, the FCC seeks comment on how this regulatory classification may impact other obligations, such as public safety and welfare.

As stated earlier, at the heart of this proceeding is the FCC's tentative conclusion that the transmission component of retail wireline broadband Internet access service provided over an entity's own facilities is "telecommunications" and not a "telecommunications service." The implication is that wireline broadband Internet access classified as an "information service" would mean that DSL would fall under Title I of the Act instead of Title II. Because Title II imposes common carriage regulations on companies, there would be no interconnection mandates and no unbundling/line sharing requirements by this class of providers.

The implications may be enormous or of no consequence--it is difficult to say in light of other proceedings now before the FCC. For instance, in its *Incumbent LEC Broadband* proceeding, the FCC could find that ILECs are non-dominant in the provision of mass-market broadband if it finds that ILECs do not exercise market power. Yet, a finding in the instant proceeding that wireline broadband Internet access is an

[19] *Notice*, paras. 30 – 61.

"information service" that should be regulated under Title I, i.e., no regulation, may lead to a resurgence of ILECs as dominant in the broadband market.

On the other hand, the FCC may chose to apply Title II regulations to the telecommunications service part of wireline broadband Internet access in the instant proceeding and yet still find ILECs non-dominant in the provision of broadband.

Essentially, given the many unknowns and the potential for one proceeding to undo another proceeding, it is difficult to formulate any regulatory framework for wireline broadband Internet access. The irony is that the FCC's tentative conclusion in the instant proceeding in and of itself creates uncertainty.

IV. PROVIDERS OF BROADBAND INTERNET ACCESS ARE STATUTORILY EXCLUDED FROM UNIVERSAL SERVICE OBLIGATIONS

The FCC seeks comment on whether facilities-based providers of broadband Internet access services provided over wireline and other platforms, including cable, wireless, and satellite, should be required to contribute to universal service. The problem here is that only "providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service."[21] The FCC's tentative conclusion that ILEC providers of broadband internet access do not provide telecommunications services would exclude such providers from the requirements to contribute to universal service.

V. CONCLUSION

[20] *Id.*
[21] 47 U.S.C. § 254(b)(4).

While the Wisconsin Commission supports FCC policies that promote the deployment of broadband facilities and services, the Wisconsin Commission cannot support the FCC's tentative finding that wireline broadband Internet access service is an information service because the transmission component of retail wireline broadband Internet access service provided over an entity's own facilities is "telecommunications" and not a "telecommunications service."

The Wisconsin Commission questions the need for such classifications at a time when there already exists broadband capacity that far exceeds demand and while state commissions are implementing prior FCC orders in their own extensive Operational Support (OSS) and Unbundled Network Element (UNE) proceedings. There is enough regulatory uncertainty without adding more.

Dated at Madison, Wisconsin, May 3, 2002

By the Commission:

/s/ Lynda L. Dorr

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Lynda L Dorr
Secretary to the Commission

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